No. 15,655

IN THE

United States Court of Appeals

For the Ninth Circuit

VIRGIL D. DARDI, Individually and as Executor of the Estate of Umberto Dardi,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

AVAKIAN & JOHNSTON,
Financial Center Building,
Oakland 12, California,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

No. 15,655

IN THE

United States Court of Appeals

For the Ninth Circuit

VIRGIL D. DARDI, Individually and as Executor of the Estate of Umberto Dardi,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF JURISDICTION.

This appeal involves a suit commenced by the United States on December 15, 1954, in the United States District Court for the Northern District of California. The suit was brought against The Mission Company, a corporation; the appellant, Virgil D. Dardi, both individually and as Executor of the Estate of Umberto Dardi; and Olga Paula, as trustee of trusts for Joseph Dardi and Mary Claire Elevita Dardi. The District Court had jurisdiction under 28 U.S.C., Sections 1331 and 1340. Judgment was entered on June 11, 1957, against The Mission Company and against appellant, both individuallly and as executor. (R. 50.) The action was dismissed as to the defend-

ant Olga Paula, trustee. (*Ibid.*) Notice of appeal to this Court was filed on July 10, 1957. (R. 51.) The appeal was timely. (Rule 73(a), Federal Rules of Civil Procedure.) This Court has jurisdiction to review the final judgment of the District Court. (28 U.S.C., Sections 1291, 1294.)

STATEMENT OF THE CASE.

This is a suit brought by the government to collect income and excess profits taxes assessed against one of the defendants, The Mission Company, a California corporation, for the years 1942 and 1943. The other defendants, including appellant, were sued as transferees. There is no dispute as to the facts of the case, which are set forth in a pre-trial order (R. 13) and a stipulation of facts. (R. 20.) The Mission Company is a California corporation which operated a restaurant in San Francisco, California, in 1942 and part of 1943. Virgil D. Dardi, the appelalnt, was the president of the corporation at that time, and his father, Umberto Dardi, since deceased, was the vice-president. On June 30, 1944, the corporation transferred all of its assets to the two Dardis and they assumed all of the corporation's liabilities. On the same day, these two individuals formed a partnership to carry on the restaurant business, and they transferred all of the assets and liabilities to the partnership, which continued to operate the business.

Virgil D. Dardi subsequently transferred his one-half interest in the partnership to one Eugene Engle,

and Engle later transferred this interest to trusts for the two minor children of Dardi.

The taxes in question, which amount to $15,983.60, were assessed against the corporation on October 10, 1947. No assessment was ever made against appellant. On October 21, 1952, appellant, as president of The Mission Company, signed waivers extending until December 31, 1956, the time of collection of the taxes in question by distraint or by proceedings in Court. However, appellant signed no such waiver in his individual capacity or as Executor of the Estate of Umberto Dardi. This suit was commenced in the District Court on December 15, 1954, and Dardi was joined as a defendant, both individually and as executor of his father's estate.

On March 6, 1956, the District Court issued a pretrial order (R. 13), and on March 28, 1956, appellant filed a motion for judgment on the pleadings (R. 18) on the ground that the action was barred by the statute of limitations, since it was commenced more than six years after the right of action accrued and appellant did not agree to any extension of the applicable period of limitation. On April 13, 1956, the Honorable O. D. Hamlin, United States District Judge, issued the following order denying the motion (R. 19):

> "Upon the authority of the case of United States v. City of New York, et al., S.D.N.Y., 134 F. Supp. 374, the reasoning of which case appears to the Court to be sound, it is hereby ordered that the motion of the defendant for judgment on the pleadings be, and the same hereby is, denied."

The parties then entered into a written stipulation of facts (R. 20), and the case was submitted to the Honorable Michael J. Roche, United States District Judge, without the introduction of further evidence. Judgment, which was entered on June 11, 1957, (R. 50) was against The Mission Company in the amount of $15,983.60, against appellant individually in the amount of $7,913.00, and against the Estate of Umberto Dardi in the amount of $7,913.00.

SPECIFICATION OF ERROR.

1. The judgment against appellant was based upon the following erroneous conclusion of law (R. 48):

> "2. That the agreement of October 21, 1952, between The Mission Company and the Commissioner of Internal Revenue, extending the time for collection of the above tax liabilities, extended the time for proceeding in court against the defendant Virgil D. Dardi individually and as executor of the estate of Umberto Dardi, and this action is therefore not barred by the statute of limitations as to said Virgil D. Dardi, either individually or as executor of said estate."

This conclusion is erroneous in that said agreement extending the time for collection of the tax in question did not purport to extend and did not extend the time for proceeding against appellant, either individually or as executor of the estate of Umberto Dardi, and this suit was therefore barred as to appellant under Section 276(c) of the Internal Revenue Code of

1939 (26 U.S.C., Section 276(c)) on October 10, 1953, six years after the taxes were assessed against the corporation.

ARGUMENT.

I. THIS SUIT WAS BARRED, AS TO APPELLANT, UNDER SECTION 276(c), INTERNAL REVENUE CODE OF 1939, IN THE ABSENCE OF AN EFFECTIVE AGREEMENT IN WRITING EXTENDING THE TIME FOR SUIT.

Section 276(c) of the Internal Revenue Code of 1939 (26 U.S.C., Sec. 276(c)) provides as follows:

> "(c) Collection after Assessment.—Where the assessment of any income tax imposed by this chapter has been made within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court, but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."

A parallel provision was enacted as Section 6502(a) of the Internal Revenue Code of 1954 (26 U.S.C., Sec. 6502(a)).

The taxes here in question were assessed against The Mission Company on October 10, 1947 (Pre-Trial Order, R. 15), and the suit was not commenced until December 15, 1954 (Complaint, R. 3 to 8). The suit was therefore barred on October 10, 1953, unless the

period had previously been extended by an effective agreement in writing.

II. THE PERIOD FOR SUIT AGAINST APPELLANT WAS NOT EXTENDED BY THE AGREEMENT BETWEEN THE COMMISSIONER AND THE MISSION COMPANY.

A. Section 276(c) does not so provide.

There is no question but what an effective agreement was entered into between the Commissioner and The Mission Company, and that the period for suit was effectively extended as to that defendant. However, no such agreement was ever executed by the appellant individually or as executor of the Estate of Umberto Dardi (Pre-Trial Order, R. 16), and the suit was therefore barred as to him unless the agreement executed by The Mission Company had the effect of extending the time for suit against appellant, as well as against that corporation.

Section 276(c) warrants no such conclusion. The section makes no specific reference to suits against transferees. While it does provide generally that the time for suit may be extended by an agreement in writing between the Commissioner and "the taxpayer", the term "the taxpayer" has been held to refer to a transferee as well as to the original taxpayer.

United States v. Updike (1930), 281 U.S. 489, 494, 50 S.Ct. 367, 368-369;

United States v. Markowitz (N.D. Cal. 1940), 34 F. Supp. 827, 830.

These cases make it clear that the six year period of limitations under Section 276(c) applies to a suit against a transferee, and that the period may be extended by an agreement signed *by the transferee. They provide no basis for concluding that the period for suit against the transferee may be extended by an agreement signed only by anyone else.*

On the contrary, Section 276(c) should be construed to mean that the period may be extended as to the original taxpayer by an agreement signed by him, and as to a transferee by an agreement signed by him, and no more. There is nothing in the section to warrant the conclusion that the period for suit against the one may be extended by an agreement signed by the other.

B. Appellant should not be bound by an agreement to which he was not a party.

While the agreement extending the time for suit against The Mission Company was signed by appellant as president of that corporation (Pre-Trial Order, R. 15), it made no reference to any transferee, nor was appellant a party to the agreement in his individual capacity or as executor of his father's estate (Pre-Trial Order, R. 16). Not only had he no reason to suppose that he was extending the time for a possible suit against him individually or as executor, but if he considered the matter at all he could reasonably have concluded that the Government intended to look only to the corporation for the payment of the taxes in question. Had the Government intended to extend the period for suit against appellant, it could easily

have indicated its intention by requesting a similar agreement from him, or at least by mentioning him in the agreement which appellant signed as president of the corporate taxpayer. It did neither.

In *Commissioner v. Bryson* (C.A. 9, 1935), 79 F. 2d 397, this Court considered the effect of a waiver of the statutory period of limitations for assessment and collection of corporate income tax, signed by a transferee as "former secretary" of a corporate taxpayer. It was held that the waiver was binding neither on the corporation nor on the transferee individually. In the Court's majority opinion, written by Judge Garrecht, it is stated:

> ". . . Neither the purported waiver nor the accompanying letter contains any statement that the respondent was the transferee of the Corporation. Without distorting plain words from their ordinary meaning, a transferee's waiver cannot be spelled out of the inchoate paper that we are here considering."
>
> 79 F. 2d at p. 401.

In his concurring opinion, Judge Denman stated the point even more forcefully:

> ". . . Had the Commissioner of Internal Revenue sought a waiver of the statute of limitations by Bryson individually, it would have been simple enough to make plain that intention without varying from the general form of 'Income and Profits Tax Waiver' which has been in customary use in the Internal Revenue Department since the Revenue Act of 1921, and which was the form utilized

in the instant case. Bryson might have been named in the body of the instrument as 'transferee.' A description of him there as 'taxpayer' would have been amply sufficient. It is a persuasive factor negativing the Commissioner's intent to hold Bryson personally, that instead of taking such elementary steps to cause the waiver to speak thus clearly, he affixed his signature to a document which on its face bound no one, and from which can be read a transferee liability only by an ultra refined metaphysical construction animated by a strong presumption in favor of the government and against the taxpayer. In addition to the proper presumption which is against the government it may be said that if there were doubt as to the interpretation of the terms of the writing, that doubt certainly should not be resolved with any presumption in favor of the party furnishing the printed form."

Ordinarily, action by one joint debtor which suspends the running of the statute of limitations does not remove the bar of the statute as to his codebtor, and there would seem to be no particular reason why a contrary rule should be applied in the circumstances of this case.

"An acknowledgement by a joint debtor does not remove the bar of the statute as to his co-debtor. The promise of one of several joint debtors cannot avail to revive as against the others a cause of action barred by the statute, or to suspend the running of the statute."

1 Wood on Limitations (1916), Sec. 81d(2), pp. 440-441.

> "It is an established general rule that in order to take a case out of the statute of limitations, an acknowledgment or new promise must be made by someone legally authorized by him so to act, such as his duly authorized agent or attorney."
>
> 34 Am. Jur., Limitations of Actions, Sec. 327, p. 258.

If the government desired to extend the time for suit against appellant as a transferee, it should have asked him to sign an agreement in his individual capacity, or as executor of Umberto Dardi's estate. At the very least it could have indicated in the agreement signed by appellant on behalf of the corporation that it was thereby intended to extend the time for suit against transferees as well as against the corporate taxpayer. Having failed to follow either of these courses of action, the government should not now succeed in its argument that the execution of the agreement by the corporation had the effect of extending the time for suit against appellant as a transferee.

C. The case of United States v. City of New York was incorrectly decided and should not be followed.

Appellant's motion for judgment on the pleadings in the District Court was denied solely upon the authority of *United States v. City of New York, et al.* (S.D. N.Y., 1955), 134 F. Supp. 374. This appears to be the only reported decision which is squarely on the issue here presented.

In *City of New York* a taxpayer had made an offer in compromise which contained a customary provision

agreeing to a suspension of the running of the statutory period of limitation on collection of the tax sought to be compromised during the period the offer was under consideration and for one year thereafter. Judge Weinfeld, a district judge, held that this action by the taxpayer also tolled the period of limitation as against his initial transferees. Appellant believes that the case was incorrectly decided, for the following reasons:

(1) The decision is expressly based upon a misconceived theory, stated by the Court as follows:

> "Statutes of limitation barring the collection of taxes must receive a strict construction in favor of the government. Limitation will not be presumed in the absence of clear congressional action."

The well-settled law is precisely the opposite: such statutes are to be construed liberally in favor of the taxpayer.

In *Bowers v. New York & Albany Company* (1927), 273 U.S. 346, 47 S.Ct. 389, the Supreme Court held that a statute barring any "suit or proceeding" for the collection of taxes five years after the return was filed should be construed to bar collection by distraint as well as by Court action. The Court said:

> "The limitation applies to petitioner and to the claims. It applies to suit; the only question is whether it also bars distraint. The provision is a part of a taxing statute; and *such laws are to be interpreted liberally in favor of the taxpayers.*" (Emphasis added.)
>
> 273 U. S. at p. 349, 47 S.Ct. at p. 390.

In *United States v. Updike* (1930), 281 U.S. 489, 50 S.Ct. 367, the Supreme Court referred to "the rule which requires taxing acts, including provisions of limitation embodied therein, to be construed liberally in favor of the taxpayer." (281 U.S. at p. 496, 50 S.Ct. at p. 369.) The Court cited the *Bowers* case, *supra.*

In *Commissioner v. Bryson* (C.A. 9, 1935), 79 F. 2d 397, this Court, citing *Updike,* said:

> "It is familiar doctrine that 'taxing acts, including provisions of limitation embodied therein [are] to be construed liberally in favor of the taxpayer.'"
>
> 79 F. 2d at p. 402.

(2) The decision in *City of New York* is based upon a misunderstanding of Section 311, Internal Revenue Code of 1939, and a misinterpretation of the opinion of the District Court for the Northern District of California in *United States v. Markowitz* (N.D. Cal. 1940), 34 F. Supp. 827. In footnote 11 to its opinion in *City of New York* the Court quotes language from the *Markowitz* opinion which, taken out of context, might seem to mean that the government could proceed against the transferee as long as the period remained open against the original taxpayer. However, in *Markowitz* the fact was that the *defendant transferee himself* had signed a waiver extending the period of limitations, and the Court held that this agreement was effective in extending the period for suit against the transferee. What the Court was

really saying in that portion of its opinion quoted in *City of New York* was that the period for proceeding against the transferee could be extended by his agreement, just as the period for proceeding against the original taxpayer could be extended by *his* agreement. In this sense, the same period is applicable to both, *viz.* six years plus any extension agreed to by the party proceeded against.

(3) The decision in *City of New York* is based upon an unsound analogy between action extending the time for *assessment* of tax and agreements extending the period for *collection.* Judge Weinfeld points out that the period for assessment of tax against a transferee may be extended by the action of the taxpayer-transferor in filing a petition with the Tax Court or executing an agreement extending the limitation period, and argues that this situation is analogous. (134 F. Supp. at p. 378.)

The difference, however, is that the period of limitation for *assessment* of tax against a transferee is determined, by express statutory provision, by the period for assessment against the original taxpayer. Section 311(b)(1) and (2) provides as follows:

> "(1) In the case of the liability of an initial transferee of the property of the taxpayer,—within one year after the expiration of the period of limitation for assessment against the taxpayer;
>
> (2) In the case of the liability of a transferee of a transferee of the property of the taxpayer,—within one year after the expiration of the period of limitation for assessment against the preced-

> ing transferee, but only if within three years after the expiration of the period of limitation for assessment against the taxpayer;—"

Obviously, any extension of the period for assessment against the transferor-taxpayer automatically extends the period for assessment against his transferee.

There is no parallel provision in the Code regarding the extension of time for *collection,* as distinguished from *assessment.* If Congress had intended a similar rule to apply to collection, it would presumably have said so. The fact that no such rule was incorporated in the Code indicates that none was intended to apply.

Moreover, the reasons which underlie the statutory rule with regard to assessment are not applicable to the matter of collection. An extension of time for assessment benefits transferor and transferee alike, since it gives the government additional time to determine the correct amount of the tax liability. All parties affected have the advantage of that time to present evidence and argument as to the amount of the liability. However, after the assessment is made and all that remains is to collect the tax, an extension of the period of limitation which is desired by the transferor-taxpayer may be of no benefit whatsoever to the transferee. Indeed, to the extent that he is misled into believing that no action is contemplated against him, it may be positively detrimental.

In the *New York City* case the agreement extending the time for collection was incorporated in an offer in compromise made by the transferor-taxpayer.

Judge Weinfeld argues that this agreement might have benefited the transferee as well as the transferor-taxpayer, since the government might have acted favorably on the offer and thereby reduced its potential claim against the transferee. The present case differs, however, in that no offer in compromise was involved and there is no evidence that any reduction in the amount of the assessment was ever considered.

In short, the case of *United States v. City of New York, et al.* was incorrectly decided and should not be followed.

CONCLUSION.

The judgment against appellant, both individually and as Executor of the Estate of Umberto Dardi, should be reversed and judgment entered in favor of appellant.

Dated, Oakland, California,
October 7, 1957.

Respectfully submitted,
AVAKIAN & JOHNSTON,
By J. RICHARD JOHNSTON,
Attorneys for Appellant.